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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
 )  
Closed Captioning and Video ) MM Docket No. 95-176  
Description of Video )  
Programming )

To: The Commission

JOINT COMMENTS

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## SUMMARY

The Notice of Proposed Rulemaking is a continuation of the inquiry initiated in this proceeding by a Notice of Inquiry. The Joint Parties timely filed Joint Comments in response to the Notice urging the Commission to exempt certain classes of programming and public broadcasters, generally, from the captioning requirements. Further, the Joint Parties suggested prospective application only of the captioning obligations and requested that responsibility for compliance with the captioning requirements rest on program producers/owners, rather than local distributing stations.

In these Joint Comments, the Joint Parties advance their earlier proposals and strongly urge the Commission to (1) generally exempt public broadcasters from captioning obligations or, in the alternative, to consider a licensee's status as a public broadcaster as a relevant factor when granting waivers under the "undue burden" exemption; (2) reexamine its proposal to impose responsibility for compliance on licensees; (3) include interstitials, promotional ads, and sports, locally produced public affairs and instructional programming as exempted classes of programming; and (4) decline to retroactively apply the adopted rules to "library programming".

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In the Matter of	)	
	)	
Closed Captioning and Video	)	
Description of Video	)	
Programming	)	
	)	MM Docket No. 95-176
Implementation of Section 305	)	
of the Telecommunications Act	)	
of 1996	)	
	)	
Video Programming Accessibility	)	

**JOINT COMMENTS**

Schwartz, Woods & Miller, on behalf of the American Program Service (APS), Connecticut Public Broadcasting, Inc. (CPTV), Detroit Educational Television Foundation (WTVS), Greater New Orleans Educational Television Foundation (WYES), Louisiana Educational Television Authority (LETA), Maryland Public Broadcasting Commission (MPT), Metropolitan Board of Public Education (WDCN), Mid-South Public Communications Foundation (WKNO), Mississippi Authority for Educational Television (MAET), the New Jersey Public Broadcasting Authority (NJPBA), Oregon Public Broadcasting (OPB), St. Lawrence Valley Educational Television Council, Inc. (WNPE/WNPI), South Florida Public Telecommunications, Inc. (WXEL), South Texas Public Broadcasting System (KEDT), the University of New Hampshire, (UNH), the University of North Carolina Center for Public Television (UNC-TV), Western New York Public Broadcasting Association (WNED/WNEQ), Window to the World Communications, Inc.

(WTTW), and WQED Pittsburgh (WQED), collectively referred to herein as the Joint Parties<sup>1</sup>, pursuant to Section 1.415 of the rules, hereby files these Joint Comments in response to the Commission's Notice of Proposed Rulemaking, (Notice), released January 17, 1997 in the above-captioned proceeding which introduced a number of proposals relating to closed captioning and video description of video programming.<sup>2</sup> In support thereof, the following is shown:

## **I. BACKGROUND**

### **A. The Joint Parties' Efforts, Experience and Limitations**

1. The Joint Parties are program suppliers and licensees of public broadcast stations serving markets throughout the United States. Collectively, they produce and distribute thousands of hours of original and high quality syndicated programming each year. Over the years, in fact, they have produced tens of thousands of hours of programming. Some of this programming is produced for the national program schedule of the Public Broadcasting Service (PBS) or for national distribution through the American Program Service (APS) or for regional distribution, while other programming is produced exclusively for local exhibition. The Joint Parties wholeheartedly support the goals of securing access for all Americans to the benefits of closed-captioned television programming. Indeed, the Joint

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<sup>1</sup> A complete list of the Joint Parties' respective television facilities is attached hereto as Attachment A.

<sup>2</sup> The Joint Comments do not address video description in detail because of the general paucity of information on the subject and because mandated provision of the service is not immediately proposed.

Parties are certain that all or most of the programming produced by them would be closed captioned provided sufficient funds were readily available. Similarly, they support the aim of making television accessible to the visually impaired through video description. In this regard, they observe that the public broadcasting system has played a cardinal role in the development and implementation of closed captioning. They note with justifiable pride that PBS' national prime time schedule, which is comprised in no small measure of programs produced or acquired by the Joint Parties, is virtually 100% closed captioned. In addition, they observe that numerous other programs produced by the Joint Parties and distributed are closed captioned. By some estimates, 75% of the programming aired by public broadcasters nationwide is closed captioned. Significantly, the considerable accomplishments in this area are a result of the voluntary efforts of public broadcasters in the absence of government mandates.

2. If the necessary funds were regularly available, the Joint Parties can state with confidence that all or most programming produced by them would be closed captioned. A brief summary of a few of the Joint Parties current achievements and difficulties in this area is set forth below.

3. APS is a major programming source and distribution system serving the nation's public television stations, providing quality programming to meet local station programming needs. Toward that end, APS seeks programming opportunities from overseas and domestic sources for national syndication. Currently some 250 programs are syndicated by APS nationwide.

APS also participates in significant co-production activities, featuring a Premium Service venture which has secured some of public television's most prestigious programs. Perhaps most important, APS' Program Exchange constitutes the largest source of free programming available to public television stations. The Program Exchange is the mechanism for making hundreds of locally produced programs available to stations nationwide. This body of programming includes a full range of "how-to" genre (for example, cooking, travel and crafts), long-form public affairs series, documentary specials and series and music performance. These latter programs typically are not closed captioned. Many, if not most, of them are produced by local stations on limited budgets. In APS' experience as a national syndicator, co-producer and conduit for the delivery of locally produced programming, closed captioning is done when the funds are available and in accordance with market demands; APS surmises that these factors largely determine whether or not a given program will be captioned. Most important, in APS' view, is that fact that the marketplace has produced dramatic achievements in closed captioning; virtually every domestic program now produced for national distribution is closed captioned.

3. At the same time, APS secures 1) a wealth of foreign programming of interest to the US market and 2) thousands of hours of older United States produced movies and series. While APS fully agrees with the goal of universal captioning, APS is vitally concerned that the Commission not adopt rules which will impede the broad access of the American public to this programming.

4. WTTW is the licensee of public television Station WTTW, the primary public television outlet serving Chicago. As a major producer for the public broadcast industry, WTTW currently produces or co-produces well over 100 hours of programming annually which is nationally distributed, including such popular series as "The McLaughlin Group", "McLaughlin's One-on-One", "Sneak Previews", "Kidsongs", and "The New Explorers", as well as a number of critically acclaimed specials. In addition, WTTW currently produces almost 350 hours of local program fare serving the needs and interests of WTTW's local audience. WTTW currently captions its national programming distributed through PBS. In some instances, WTTW has been able to pass the costs on to co-producers or underwriters. In other instances, WTTW and PBS have shared the budgeted costs. WTTW's locally produced programming is generally not closed captioned. In addition, WTTW devotes approximately 55 hours of air time per year to fundraising appeals. WTTW estimates that the cost of captioning all of this program material would run well over a million dollars. Required captioning of all programming (without a corresponding increase in revenue) could force WTTW, a major producing station, either to decrease its production of original programming or to increase the proportion of less expensive programming (i.e., more "talking heads" programming and fewer field shoots, documentaries and the like).

5. MPT is the state agency charged with the responsibility of providing public television services to the citizens of Maryland. Like WTTW, MPT is also a major producer of nationally distributed public broadcast programming. In particular, MPT



produces approximately three hours of such programming per week. Additionally, MPT produces approximately three to four hours per week of local or regional programming, as well as a number of specially-produced programs each month, such as debates and cultural and entertainment programs. In total, MPT produces well over 380 hours of programming per year. Currently, the majority of MPT's national programming is closed captioned; by the end of 1997, MPT anticipates that some 95% of all programming that it produces, exclusive of station breaks, news breaks and fund-raising drives, will be closed captioned. MPT employs two full-time persons on staff to caption its programs.

6. NJPBA is the state agency responsible for providing public broadcast service to the residents of New Jersey. Over the past few years, NJPBA has experienced a steady decline in state funding of its operations. Notwithstanding this circumstance, NJPBA remains one of the largest producers of local programming within the public television system, producing in the neighborhood of 750 hours per year. In addition to its live nightly newscast, NJPBA airs a large amount (at least three to four programs per week) on a "near live" basis with a one to four-hour turn around. Such shows effectively could only be captioned in real time. Severe funding limitations permit NJPBA to close caption only programs of special significance and scripted portions of various programs, including in particular NJPBA's nightly news program. Closed captioning of all of NJPBA's local programming currently would cost well over one million dollars per year. Dedication of such monies to closed captioning would require the elimination of a substantial amount

of NJPBA's current program services. Under these circumstances, universal closed captioning is neither feasible nor in the public interest.

7. Despite these limits, NJPBA has installed hardware and software which permits closed captioning of scripted material delivered by a host reading a teleprompter. This system works with scripted programming but does not work with unscripted material, which can only be captioned by means of extremely expensive real time captioning or by off-line captioning, which results in some degradation of picture quality and requires a minimum advance time of one or two days to complete, which is wholly unsatisfactory for live news programming.<sup>3</sup> In the latter regard, NJPBA is pleased to announce that it has received a state grant of some \$60,000 for off-line hardware and software which will enhance its ability to add closed captioning prior to broadcasts. Of course, this new equipment will require an as yet undetermined amount of staff training and time to implement and will cost money to maintain. The extent of these costs is unknown at this time, but NJPBA expects that it will be substantial. Obviously, too, without this grant, NJPBA would be unable to expand its current closed captioning efforts. In any event, NJPBA is committed to captioning as many programs as possible.

8. UNC-TV operates North Carolina's statewide public television network. It is part of the 16-campus University of

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<sup>3</sup> Based on NJPBA's experience, it takes at least approximately 8-16 hours of time to caption a single 30-minute program off line. In addition, NJBPA has observed community resistance to the captioning only of scripted portions of a program, and has to date declined to caption its newscast in part because of that concern.

North Carolina system. UNC-TV produces over 350 hours of locally produced programming annually, and an additional 85 hours of live production specifically for fund raising efforts. A significant amount of this programming is aired either live or on a same-day basis; some of it (particularly instructional programming) includes a call-in component. UNC-TV estimates that the cost of captioning all of this program material would be in excess of \$750,000. UNC-TV supports the goal of broadly available closed captioning. Toward this end, UNC-TV has been able to secure specific local grant funding to permit the captioning of seven to ten hours of programming annually. This mechanism has permitted the captioning of key programs, such as the Governor's State-of-the-State address. However, this type of funding source is short term and cannot be relied upon, let alone increased by the magnitude necessary to meet the projected funding needs of required captioning of all programming. At the bottom line, required captioning without specific funding for it will necessitate a reduction in the quantity and/or quality of local programming which is uniquely designed by the licensee to meet the specific needs of the North Carolina viewing audience it is mandated to serve. Finally, like most licensees, UNC-TV has an extensive program library; currently, this library consists of over 20,000 tapes, the vast majority of which are not captioned.

9. WQED is the licensee of public television Stations WQED-TV and WQEX-TV, Pittsburgh, Pennsylvania. WQED is a major producer of national public television programming, producing 50-75 hours of such programming per year. In addition, WQED produces approximately 200 hours of local programming per year.

While all of WQED's programming for national distribution is captioned as required by PBS, from time to time WQED must engage in additional fundraising to cover the cost of captioning in connection with these national programs. Not surprisingly, WQED is often forced to forego captioning of its local programming, whether live or recorded, because in the absence of specific grants, WQED's program budgets simply cannot include this additional expense. Required captioning of all of this programming could force WQED to decrease production and, in particular, local production. In addition, a broad captioning requirement could require WQED's programming department to limit its program purchases to those programs which are closed-captioned; WQED would like to stress that such a result is not consistent with its commitment to serving its community inasmuch as there is a wealth of programming responsive to local needs and interests which is not captioned.

10. CPTV is the non-profit entity responsible for providing statewide public television service to the residents of Connecticut. It is another significant producer of programming for both local and national public television audiences. CPTV estimates that it produces well over 100 hours of programming per year, including recurring program series and an average of two to four "specials" per month. In addition, CPTV broadcasts well over half (some 17-21 games) of the University of Connecticut's Women's Basketball season. UConn Women's Basketball has a high rating in the areas served by CPTV and CPTV provides the only local broadcast. If CPTV is required to absorb captioning costs, of at least \$1200 per hour, in addition to production costs for

each televised game, for programming that is marginally profitable, the result would most likely be discontinuation of such sports programming. CPTV has to date captioned few programs; quite simply, funding limitations have precluded extensive closed captioning of CPTV-produced programs. Notably, it has captioned programming addressing disabilities where funding was provided by foundations with a particular interest in such programming. Without such outside funding, which cannot be guaranteed for CPTV's general interest programming, CPTV would be unable to budget the costs of closed captioning in these special programs.

11. MAET is the licensee of the statewide public television system which has served the State of Mississippi for over 25 years. MAET was a pioneer in the initial development of closed captioning technology in the 1970s. Since then, MAET has offered closed captioning on all PBS programming which includes it. In 1993, MAET began its own efforts to caption local programming. Captioning equipment has been purchased and MAET is in the process of hiring and training two staff members. Once the system is fully operational, MAET expects the cost per pre-recorded hour in the \$2200 range. The annual costs will be in the hundreds of thousands of dollars. It must be stressed that: 1) MAET does not expect to be able to caption all of its currently produced programs, let alone its previously produced works; and 2) this effort would not be possible without a generous state appropriation for the service. Like WTTW, MAET is concerned that mandated captioning, particularly of local programming, will result in reduced local production of lower quality. The impact of such an unfunded mandate on smaller

public television stations which do not have specific state appropriations supporting closed captioning efforts will be even more severe.

12. OPB is the licensee of the statewide public broadcast system serving the State of Oregon. OPB produces various live local programs, including a weekly question-and-answer type public affairs program, which are essentially unscripted. OPB does not have the technical capacity to provide immediate translation via real time close captioning in these circumstances, and the cost of acquiring such capacity would be prohibitive in light of OPB's funding limitations. OPB also offers essentially unscripted "outreach" programs covering topics of local interest (such as college financial aid opportunities, literacy) which involve not only a host but also an array of volunteers. OPB simply does not have the funds to caption this programming and would be forced to discontinue it in the face of a federal mandate in this regard. At the same time, OPB supports the Commission's goals and may be financially able to close-caption certain locally produced documentary programming which it produces.

13. Station WDCN(TV), Nashville, Tennessee, operates in the 33rd television market and has been on the air for almost 35 years. Station WDCN is operated by a school board and is just emerging from difficult financial times; it is operating with a reduced staff and has no funding prospects for substantial new requirements. The station has the ability to broadcast both closed captions and descriptive video, but it has no closed-captioning origination equipment or staff. Station WDCN produced 336.5 hours of local programming last year, of which about 40%

was for fund-raising. The station produced 201 hours of regular programming last year, some of which was distributed statewide or regionally and some nationally. The licensee is nonetheless concerned that a comprehensive closed-captioning requirement would have a severe impact on the financing of local productions.

14. Station WXEL-TV, West Palm Beach, Florida, produces approximately 150 hours per year of regularly scheduled local programming, most of which is public affairs, and upwards of 50 special programs per year. In addition, the licensee offers two hours a day of college-level courses for credit which it secures from local, regional and national sources. With the exception of some of the telecourse material, none of this programming is captioned. Station WXEL-TV does not have captioning equipment, nor does it have the funding which would be necessary to caption this material.

**B. Public Broadcasters Face Significant Obstacles to Universal Closed Captioning of Programs**

15. Against this backdrop of the Joint Parties' experiences, a number of basic issues must be acknowledged in addressing the implementation of closed captioning rules and their relationship to the operational realities underlying the vast majority of public television licensees' operations. While the Joint Parties fully support the broad accessibility of television programming, they are nonetheless vitally concerned that any fresh and unfunded government mandates not impose unrealistic demands on their financial ability to provide closed captioning or video description services, particularly in the current public television funding climate. The overall cost of closed

captioning of programs is substantial. While the cost-per-hour is decreasing, it nonetheless ranges from \$800 - \$2500 per hour for "off-line captioning" to as much as \$1200 per hour for "real time captioning" (See NPRM at paras 18-22). On an annual basis, the total cost for the closed captioning of all the programming produced by the Joint Parties would run well into the millions of dollars.

16. To the extent that these stations produce programs for distribution through PBS or APS, they shoulder almost all of the costs of closed captioning inasmuch as those organizations generally either do not fund or only partially fund the service, although PBS requires closed captioning in its typical production arrangement. In short, unless funds for closed captioning can be found within the budget for any particular program production, it simply is not possible for such a program to be closed captioned.

17. Further, it should be stressed that the public broadcast industry constantly faces the prospect of decreased federal funding support for their activities. The current moves in Congress to reduce public broadcast funding and/or revamp the manner in which public broadcasters receive public support will inevitably place greater strains on budgets that are already stretched to the limit and constrain many licensees in their efforts to provide service to their constituents. At the same time, public broadcasters are well aware that a substantial portion of their audience is comprised of hearing impaired individuals and that closed captioning can also benefit non-hearing impaired persons to the extent that it can be used as a tool in learning language. They thus have every incentive to provide the service where they have the financial wherewithal to do so.



18. Secondly, public broadcasters which produce their own programming as well as the independent producers whose programming they present to the public broadcast system are heavily dependent upon sources other than the federal government to underwrite their programming. This dependence certainly will increase in the future as federal funding decreases. Underwriting is a key source of support for program production. While public broadcasters routinely seek money for closed captioning from program funders, such funders frequently decline to provide for the service in the production budget.<sup>4</sup> Without these funds, closed captioning cannot be provided in the absence of support from an independent source such as a foundation.

19. Then, too, the Commission must distinguish among the different methods of closed captioning which may be applied to any given program and the implications of each. Teleprompter closed captioning, the least expensive mode, can be applied to the portions of live programs, such as news or public affairs shows, which are scripted. Thus, it is possible to make portions of news and public affairs programming available to the hearing impaired. Unfortunately, this technology cannot be applied to the unscripted portions of news, public affairs, sports and other live programs, which means that in the absence of the more expensive real-time captioning, a live program or a program which includes a live component such as a call-in segment, cannot be made fully available to the public.

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<sup>4</sup> NJPBA, for example has had no success to date in securing local underwriting to support closed captioning of its locally produced programs. Other of the Joint Parties have had similar experiences.

20. Off-line closed captioning equipment, which can be used on site as an alternative to shipping programming out for the service, can be secured at a substantial one-time cost (approximately \$50-75,000). It requires significant staff time to operate over the course of a year. For licensees which produce a large amount of programming, in-house closed captioning of this type may prove cost effective over a reasonable period of time. For licensees which do not produce large amounts of programming, in-house off-line captioning is not cost effective. At the same time, off-line captioning results in some degradation of picture quality since it entails a re-recording of the program to be closed-captioned. Further, this method raises logistical issues to the extent that it may take one or two days from the completion of a program to close-caption it, and considerably longer where the program has to be shipped out for captioning by a third party. As a practical matter, therefore, because much if not most locally produced public affairs programming is produced for same day or next day airing, off-line captioning is not feasible; real time captioning would have to be employed.

21. Real-time closed captioning, which is necessary for the full captioning of live programming or programming aired on quick turnaround basis, is extremely expensive. While it might be feasible for some licensees to use real-time captioning for certain special programs, its cost on an ongoing basis in connection with a continuing program series such as a daily news program is prohibitively expensive. Moreover, the short turnaround time (one to two days) of much locally produced public affairs programming effectively means that real-time closed captioning must be employed for this program fare.

## II. THE JOINT PARTIES' PROPOSALS

### A. Public Broadcasters Should Be Exempt From Closed Captioning Requirements Based Upon Their Status

22. The Joint Parties fully agree with the aims of Section 713 of the Telecommunications Act of 1996 (the Act) to assure broad accessibility to programming and have, on a voluntary basis, advanced such access as highlighted above. The Commission has indicated that there will be no general exemption for any class of programming provider because, to some degree, all providers have the capacity to deliver closed captioning and distribute the same type of programming. Nevertheless, the Joint Parties urge the Commission to exempt public broadcasters from the requirements of Section 713 in light of their obvious funding difficulties, the mechanism by which funds are raised and allocated for public television programming which they produce or commission, and their record of closed captioning accomplishments in spite of those limitations.

23. Alternatively, should the Commission retain its decision not to exempt public broadcasters generally, it should at the very least permit a licensee to qualify for an exemption under the "undue burden" standard if it can certify that funds for a production do not include an allocation for closed captioning and that such funding could not be raised through good faith negotiations with prospective funding sources.

24. More generally, the Joint Parties propose that the Commission consider the licensee's status as a public broadcaster as an additional factor under the proposed "undue burden" waiver policy. The standard for an exemption is whether captioning

involves "significant difficulty or expense". As illustrated,

public licensees face financial considerations which are particular to public broadcasting and severely restrict their ability to reach outside these constraints to provide additional services, especially one as costly and complex as captioning. In fact, the House Report listed "the non-profit status of the provider" as a suggested factor to be considered under this standard. Public broadcasters are non-profit or state agency organizations which will suffer similar debilitating consequences as a result of their operation as a public licensee. The Commission should consider this factor under the "undue burden" waiver policy.<sup>5</sup>

**B. The Commission's Closed Captioning Mandates Should Not Be Applied to Licensees or Distributors**

25. The Joint Parties have produced and/or delivered a significant amount of closed captioned programming despite their lack of financial resources and technical capability. The Commission has proposed to impose responsibility for complying with the adopted rules on licensee providers. The Joint Parties, however, strongly believe that a closed captioned mandate should not be applied to a local station distributing a program.<sup>6</sup> The cost of closed captioning for public broadcasters is, in most cases, prohibitively expensive given their relatively small operating budgets and proven inability to secure consistent

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<sup>5</sup> Let it be noted that MPT supports broader closed captioning requirements and does not concur with the position advocating a status-based exemption for public broadcasters set forth in Paragraphs 22 and 24 hereof, while agreeing that an "undue burden" exception should be available.

funding for such service.<sup>7</sup>

26. In addition to the prohibitive cost imposed, programming providers will suffer considerable interference with their primary distribution functions as a result of the closed captioning mandate proposed by the Commission. Personnel will have to be realigned and functions will have to be redesignated in an effort to accommodate the newly required captioning process. Admittedly, most public broadcast stations are also producers and are familiar with the processes involved. However, the resulting interference to their primary distribution process will lead to further increased costs and inefficient operations. Indeed, Congress and the Commission both note that "it is clearly more efficient and economical to caption programming at the time of production and to distribute it with captions than to have each delivery system or local broadcaster caption the program."<sup>8</sup> Producer/owner responsibility for program captioning is both logical and fair. In light of these considerations of cost and time demands, mandated closed captioning by public broadcasters of programming supplied to them without captioning would force meritorious programming off the air.

27. Certainly, the overall effect of imposing such a financially exacting responsibility on public broadcasters will be a significant decrease in the amount and diversity of available programming. Public broadcasters will opt to purchase

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<sup>7</sup> For example, NJN estimates that full captioning of its locally produced programs would require either the equivalent of two full-time real time captioners on staff or use of contractor captioning services for up to six hours per day, five days per week and an additional hours on weekends.

<sup>8</sup> NPRM, paragraph 27 and paragraph 28, fn 88.

less programming from outside producers which is not already captioned because of the additional expense they will necessarily incur by subsequently captioning it. Further, because resources would have to be allocated to closed captioning of much purchased programming, public broadcasters will have to reduce the amount of programming they produce. Current experience demonstrates the difficulty which public broadcasters encounter in securing sufficient funds for closed captioning of their own programs. Diversity in programming is likely to suffer as public broadcasters move away from airing non-captioned programming which is nonetheless responsive to local needs.

28. At the same time, the current availability of closed captioning in connection with new programming demonstrates that market forces in tandem with reasonable and responsible actions by program producers, distributors and providers are in fact working very well to generate closed captioned programming. In all, imposition of compliance responsibility on licensees will contravene the goal of maximizing the amount of available closed captioned programming and, ironically, make licensees less responsive to their constituents. The Joint Parties submit that licensees efforts to serve their viewers should not be skewed by a requirement discouraging or prohibiting the distribution of a program solely because it is not captioned.

**C. The Commission's Closed Captioning Requirements Should Be Applied Prospectively Only**

29. In any event, whatever requirements the Commission ultimately decides to adopt should be applied prospectively only. The Commission suggests designating that a certain percentage, i.e., 75%, of "library programming" be closed captioned. There

are literally hundreds of thousands of hours of programming which has been produced by public broadcasters over the years. Funding for public broadcasting is steadily decreasing and is currently restricting the services they are able to provide. As demonstrated, public licensees are significantly restricted in their ability to close caption current and/or new programming. It is clear that there are simply no funds available to then also close caption the thousands of hours of programming which have already been produced.<sup>9</sup> These costs have not been previously figured into production costs or purchase prices. The Joint Parties' collective experience with closed captioning of current productions clearly reveals that there is no discernible source of funding for most previously produced programming. To compel retrofitting of these programs would divert captioning resources away from fresh and original programs. The Commission should not permit this result.

30. In a related vein, requiring that broadcasters close caption an arbitrary percentage of programming is ineffective and unnecessary. The nature of public television programming is somewhat unique insofar as it provides programming not generally available to the large general masses and is not a ratings and

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<sup>9</sup> For example, NJPBA alone has a massive program library dating back to 1971. NJPBA could not begin to estimate the cost burden associated with the captioning of this material; and, too, NJPBA notes that the per-program captioning costs for this kind of fare would be greater than the costs of captioning current programming inasmuch as scripts and other background materials are often no longer available. Similarly, many of the Joint Parties such as MAET, UNC-TV, OPB and others, have huge program libraries; retroactive captioning this programming along the lines suggested by the Commission is not possible. In short, the Commission's proposal to apply captioning requirements retroactively will present most, if not all, of the Joint Parties with the prospect of extensive captioning obligations in the absence of any funds to fulfill them.

revenue based service. Some of this programming remains popular, while other programming remains on the shelf. It is inappropriate to subject public licensees which furnish such a significant service through the provision of unique and diverse programming to the threat of penalty when it chooses to air a program which may be a vintage or obscure piece in response to their audience demands. The effect, of course, would be to archive the material rather than air the programming, again resulting in a decrease in overall programming, let alone closed captioned programming. Finally, since the Commission proposes an arbitrary percentage and is leaving the discretion in the type of library programming to be included within that percentage, it is likely that the programming would be done voluntarily closed captioned in any event.

**D. The Commission Should Establish Content-based Exemptions for Certain Types of Programming**

31. The Joint Parties fully agree with the importance of assuring broad accessibility to programming. They note that the Commission has significant flexibility under the statute to exempt certain types of programming from closed captioning requirements and to allow programmers to seek an exemption from closed captioning requirements upon a showing that imposition of such requirements would impose an undue burden. At the same time, establishing criteria for determining whether an exemption based upon "undue burden" is appropriate could well ensnarl the Commission and public broadcasters alike in an unwieldy and inefficacious regulatory scheme. For this reason, the Joint Parties strongly believe that certain content-based exemptions are entirely appropriate. The Joint Parties wholeheartedly



support the Commission's proposal (Notice, paras. 79, 81) to exempt interstitials, promotional advertisements and fundraising activities of noncommercial broadcasters from the requirements. However, the Joint Parties request clarification that these exemptions include public television licensees' short-form programming of five minutes or less duration, including material promoting station programming and related activities, underwriting credits, news breaks or other informational programming and the like.

32. Further, the Joint Parties request broader coverage of the exemption for foreign programming. The Commission proposes exempting programming that is in languages which are not based in a Latin-based alphabet. See Notice, para. 72. Public broadcasters, unlike commercial broadcasters, import significant amounts of foreign programming. Much of that programming is from England, which would not be exempted under the current proposal. However, foreign programming does not include closed captioning, and there is no indication that foreign governments will impose closed-captioning requirements in the same way or on the same timetable as the FCC, if at all. A uniform imposition of closed-captioning requirements on new production could serve effectively to bar or hamper the importation of this foreign programming, which adds substantially to program diversity.

33. The Joint Parties request the Commission to adopt a rule categorically exempting sports programming and locally produced public affairs programming from closed captioning requirements. Sports programming should be exempt because it is primarily visual in nature and textual graphics are frequently used to communicate statistics and progress, essentially